DCCC280/2012

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. 280 OF 2012**

HKSAR

v.

**Leung Shing-shi(D1)
So Ka-wai(D2)
Tang Yuk-po(D3)**

Before: Deputy District Judge E. Lin
Date: 31 August 2012 at 2.32 pm
Present: Miss Virginia Lau, SPP of the Department of Justice, for HKSAR
Mr Oliver H Davies, instructed by Wong & Co., for all Defendants
Offence: Inflicting grievous bodily harm (對他人身體加以嚴重傷害)

Reasons for Verdict

Background

1. An innocent man died while he was in the lawful custody of the Hong Kong Correctional Service Department on 16 August 2009. The deceased person, Mr Chen Chu-nan (hereinafter referred to as 'the deceased'), was an otherwise healthy 30 year old Taiwanese national with no known history of major illness or substance abuse. Arrested in Hong Kong by the police on the 12th day of August, he was under a court order to be remanded in Lai Chi Kok Reception Centre until 11 September 2009.

2. On the morning of 15 August 2009 the deceased was examined by a doctor who found him perfectly healthy. Later he was observed to be acting oddly and murmuring to himself. The

CSD officer in charge thought fit to request another medical examination. He was not cooperative. While waiting for his turn to see the doctor he rushed into the Consultation Room on the ground floor of Lai Chi Kok Reception Centre, followed by other CSD officers.

3. At 11.18 am he was taken to a Protected Room for observation. At about 0748 hours on the 16th day of August 2009, he was found unconscious by CSD officers. Attempts of resuscitation proved futile. He was certified dead at 0848 hours in Princess Margaret Hospital. The post-mortem examination identified no less than 117 external bruises and injuries on his person, including reddish bruises to the head, around the eyes, neck, trunk, including shoulders, chest, buttocks and hips, all four of his limbs, and extensive haemorrhaging on the back of the upper right thigh. On the left side of his scalp there was a deep bruise. The cause of death was listed in the autopsy report as 'extensive soft tissue injury'.

4. Prior to his detention in the Protected Room he was in the Consultation Room with three Correctional Services Officers, the defendants in these cases. Two of them, namely D1 and D2, were last seen to be trying to restrain the deceased by pressing him down under the watchful eyes of D3, the CSD Principal Officer.

<u>The Charge</u>

5. As a result of the incident the defendants faced one charge of inflicting grievous bodily harm, contrary to section 19 of the Offences Against the Person Ordinance, Cap. 212, the particulars of which read:

> 'Leung Shing-chi, So Ka-wai and Tang Yuk-po, on the 15th day of August 2009, at Lai Chi Kok Reception Centre, Sham Shui Po, Kowloon, in Hong Kong, unlawfully and maliciously inflicted grievous bodily harm upon Chen Chu-nan.'

The Law

6. The power of the Correctional Services officers comes from the following sources, namely:

(1) Section 101A of the Criminal Procure Ordinance, Cap. 211, the relevant part of which reads:-

> **'A person may use such force as reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or of persons lawfully at large.'**

(2) The Prison Rules 237 and 238 made pursuant to section 25 of the Prisons Ordinance, Cap. 234, the relevant parts of which read:

> **'(237) Use of force**
>
> **(1) No officer of the Correctional Services Department, in dealing with prisoners, shall use force unnecessarily and, when the application of force to a prisoner is necessary, no more force than is necessary shall be used.'**
>
> **'(238) Occasions when arms may be used**
>
> **(4) Every officer of the Correctional Services Department may use arms against any prisoner using violence to any brother officer or other person, provided that such officer has reasonable grounds to believe that the officer of the Correctional Services Department or other person is in danger of life or limb, or that other grievous hurt is likely to be caused to him.**
>
> **(5) Before using arms against a prisoner under the authority contained in paragraph 2, the officer shall warn such prisoner that he is about to fire on him.**
>
> **(6) An officer of the Correctional Services Department shall not, in the presence of his superior**

officer, use arms of any sort against the prisoner in the case of an outbreak or attempt to escape except under the express orders of such superior officer.

(7) The use of arms under this rule shall be, as far as possible, to disable and not to kill.'

7. Cap. 23 of the CSD's own departmental codes and procedures also set out the following guidelines for the use of force and arms:-

'23.01 Stipulations on the use of force or arms

(3) The use of force or arms is an exceptional and extreme measure. It is an officer's last resort either to protect himself or other persons from a serious threat of injury or to enable him to meet a concerted threat to good order or security.

(4) An officer shall display self-discipline and exercise a high degree of restraint when dealing with any person and shall not resort to the use of force or arms unless such action is clearly necessary. The use of force or arms under this order shall be, as far as possible, to disable and not to kill.'

'23.05 Degree of Force

(1) The principle governing the degree of force or arm is that only the minimum force necessary may be used to achieve the lawful purpose. Once this has been attained the use of such force or arms shall cease immediately.

(3) Batons or extendable truncheons will not be used when two or more officers are dealing with a single, unarmed prisoner, except on the order of a senior officer present.'

8. An internal memo of the CSD dated 20 January 2000 also set out the guidelines on the use of OC foam and its decontamination.

9. Briefly put, a Correctional Services officer has the legal power to use force when necessary, but the force used cannot be more than necessary. If the force is used unnecessarily or the degree of force exceeds what is necessary they cannot be said to be acting within lawful authority, and if such force causes injury to the inmate he will be held liable in accordance with the law.

10. It is the prosecution's contention that in the process of restraining the deceased they had used unnecessary force and thereby unlawfully and maliciously inflicted grievous bodily harm on his person.

<u>On Joint Enterprise</u>

11. The defendants were charged jointly in this case. The prosecution contends that they were all party to a joint enterprise while the deceased was within the Consultation Room being subject to unreasonable force by a one or more of the defendants. In such a case the prosecution does not have to prove which of the defendants is responsible for inflicting which particular injury or at what point each of the defendants joined in (see <u>HKSAR v Terrado Alfredo S & Anor</u>, unreported Cr.App. No. 112/2005), and each is liable for the consequences of an overt act (see <u>R v Britain & Shackell</u> (1848) 3 Cox CC 76. In the CFA case of <u>Sze Kwan Lung & Ors</u> [2004] 3HKLRD 328 at page 339, Bokhary PJ explained the principle thus:

> '(33) Joint enterprise is an expression used to denote the conduct of two or more persons who take part together in the course of criminal conduct. So many and varied are the circumstances in which the doctrine of joint enterprise operates that no single case can be expected to provide an occasion for discussing every aspect of the doctrine. One such set of circumstances by no

means uncommon in the experience of our courts is where multiple injuries are inflicted on a victim set upon by a group of assailants. Many injuries are inflicted, only one injury proves fatal, and evidence does not show which assailant inflicted the fatal injury. The circumstances of the present case are comparable since the prosecution is unable to say which particular person actually started the fire.

(34) While this is not the occasion for giving a definitive decision on the entirety of the doctrine of joint enterprise, it is in my view, as indicated above, the doctrine is distinct from the common law principles of aiding, abetting, counselling and procuring. Each participant is criminally liable for all the acts done in the pursuance of the joint enterprise and, whether or not he intended it, he will be criminally liable for any such act if it is of a type which he foresaw as a possible incident of the execution of the joint enterprise and he participated in the joint enterprise with such foresight. This may be traced at least as far back as Alderson B's famous direction to the jury in Macklin v Murphy's case [1838] 168 ER 1136, and it is the effect of our law as it has been clearly understood at least since the decision of Privy Council on appeal from Hong Kong in Chan Wing Siu v R [1985] AC 168 which involved murder and wounding with intent. I have particularly in mind what Sir Robin Cooke, as Lord Cooke of Thorndon then was, said at page 175G and H and 177B in the course of delivering their Lordship's advice in that case."

(35) After examining the authorities in Australia and New Zealand, as well as in England, Sir Robin Cooke said this at pages 177G to 178B:

> "The test of mens rea here is subjective. It is what the individual accused in fact contemplated that matters. As in other cases where the state of a person's mind has to be ascertained, this may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time, including, of course, any explanation that he gives in evidence or in a statement put in evidence by the prosecution. It is no less elementary that all questions of weight are for the jury. Prosecution must prove the necessary contemplation beyond all reasonable

doubt, although that may be done by the inferences as just mentioned."'

The Issues

12. In the present case there can be no dispute that the defendants did have the power to use and did use force to subdue the deceased, and that the deceased did sustain grievous bodily harm. The issues to be determined are whether the injuries had been caused by the defendants' use of force and whether the force used had exceeded what was necessary in the circumstances.

13. This is a criminal trial, needless to say that the prosecution has a duty to prove all the elements of the crime beyond a reasonable doubt. The defendants have no burden to prove anything.

14. In this case the defendants had elected not to give evidence at the end of the prosecution's case. This is their right and no adverse inference can be drawn against them. It simply means that this court does not have an alternative, if any, version of facts to consider. Again it does not affect the burden of the prosecution to prove every element of the crime beyond a reasonable doubt.

15. The defendants in this case are men of good character. In considering the evidence of the prosecution and in drawing inferences from the primary facts, the court would particularly bear this fact in mind for it is accepted that men of good character are generally less likely to commit crimes and that if they choose to give evidence, their testimonies would carry more weight than those who do choose not to put forward this fact before the court.

The Voir Dire Proceedings

16. Each defendant had given two statements during the Police investigation of the incident. The prosecution sought to produce them as evidence. A voir dire was thus held to determine

their admissibility. Six police officers were called by the prosecution to produce the statements. All the police officers agreed in court that they suspected a crime had been committed when they interviewed the defendants. For some reasons they decided to invite the defendants to give evidence only as witnesses. None of the defendants had been warned that what they were going to say would be used as evidence against them. They were not reminded of their rights to silence.

17. Although the statements were voluntary in the sense that they were not obtained by threat or violence and that they were clearly relevant, I ruled at the end of the prosecution's case that the statements were inadmissible as the defendants were given the impression that they would not be charged for what they were going to say in the statements. As such, the statements were not voluntary in the eyes of the law: see the statement of principal by Lord Sumner in Ibrahim v Rex [1914] AC 599 at page 609.

18. Furthermore, the defendants were giving statements in respect of a matter which occurred in the course of their duties. They were compelled by their duties to give an account of what had transpired. To use a statement taken under such circumstances would be a breach of the guarantee under section 11(2)(b) of the Hong Kong Bills of Rights Ordinance.

19. I also consider that this is a proper case to use my discretionary power to exclude. Accordingly all the statements had been excluded.

Evidence

20. Although I have considered all of the evidence, for the sake of brevity here I would only set out the most essential parts pertaining to my decision.

The Undisputed Evidence

21. Part of the evidence had been admitted under section 65C of the Criminal Procedure Ordinance, Cap. 211, see MFI-1 to 4. I would not repeat them in full. Parts of the witnesses' testimonies were not challenged. The followings are, in my view, the most salient features in this case as gleaned from the admitted facts and matters not disputed:

- **After Chen Chun-nan was arrested by police on 12 August 2009, by a court order he was remanded in custody in Lai Chi Kok Reception Centre until 11 September 2009.**

- **The deceased, aged 33, was of moderate built; he weighed 58kg and his height was 163cm. He was not a drug dependent, had not suffered from any serious illness or psychiatric illness or undergone any surgical operation. He had no history of allergy to drugs or been prescribed any psychiatric treatment or medicine. He had self-harm idea or act. He had not been prescribed with any long term or specialist medication.**

- **In the morning on 15 August 2009, Dr Wong Chi-ho, PW7, carried out physical examination of the deceased in Lai Chi Kok Reception Centre. The doctor made the following remarks in the deceased's Health Screen Form: 'Good past health', 'Not known drug addict', 'No alleged assault', 'No claimed allergy' and 'Stable'.**

- **On the same day the deceased was observed to be behaving oddly. Therefore arrangement was made to take him back from the reception office to the hospital in Lai Chi Kok Reception Centre (both on the ground floor of the same building) for a second examination.**

- **The three defendants were on duty in the hospital on the morning of 15 August 2009. Tang Yuk-po, D3, the principal officer, was issued with OC foam, and the other two defendants were each equipped with an extendable truncheon before they carried out their duties. At about 11 am, inside the Consultation Room, OC foam was used on the deceased. After the incident a report for the use of OC foam had been filed. There was no report for the use of the extendable truncheons.**

- **At 1109 hours, the deceased was escorted to the Protected Room (Cell No. 4) on the 1st floor of Lai Chi Kok Reception Centre. The Protected Room was equipped with padded walls and was used to confine refractory or violent inmates, presumably to allow them to calm down. The room was designed to prevent those confined within from injuring themselves or others. Except for the approved articles such as bedpan and blanket, no other article was placed inside.**

- **From 1118 hours on 15 August to 0805 hours the next day, the deceased was kept in the Protected Room. CSD officers checked on the deceased through the observation window every 15 minutes. In addition his movements were monitored and recorded by a CCTV camera. The CCTV footage (P6 and P6A)showed the deceased walking, sitting or laying on the floor restlessly most of the time. Occasionally he used his body to bang against the padded wall or door, crawling on the floor, attempting to open the door, wandering in the room playing with his clothing and his own fingers. Before he was taken to the**

Protected Room he was alone in the Consultation Room with the three defendants.

- At 0748 hours on 16 August 2009 the deceased was found unconscious. Despite repeated resuscitation attempts by Correctional Services officer, the paramedics of the ambulance, hospital staffs and the doctor attached to the A&E Department of Princess Margaret Hospital, he was certified dead at 0848 hours.

22. There is no direct evidence on what happened in the Consultation Room where the deceased was alone with the three defendants. What had happened could only be inferred from the factual evidence and from that of the forensic experts.

Events Leading to the Deceased's Confinement in the Protection Room

23. On the morning of 14 August 2009, Mr. Kwong Kwok-bun AOII of CSD(PW2) first met the deceased when he was admitted to Lai Chi Kok Reception Centre. According to his evidence, at 0930 hours on 15 August 2009 he saw the deceased again at the reception office. As the deceased did not carry the inmate identification slip as he was supposed to, PW2 had to check with the computer record to confirm his identity. PW2 found the deceased acting strangely and repeatedly left his assigned seat to talk to PW2, demanding to leave. PW2 therefore arranged for him to be seen by the doctor again. At around 1015 hours the deceased suddenly left his seat and ran up the staircase leading to the hospital on the 1st floor. PW2 told him to walk back down slowly and the deceased did as told. During the 50 minutes when the deceased was under the charge of PW2, he had kept the latter under observation. That morning, of more than 20 inmates under his supervision, only the deceased behaved in such a way. He did not notice if the deceased had any injuries on his person.

24. Under cross-examination PW2 accepted that he first gave his statement in June 2010 and that his recollection of the events that day was not that clear.

25. In the same morning AO Koon Kin-yip (PW1) was tasked with maintaining orders in the hospital corridor. At about 1030 he heard commotions and subsequently saw the deceased standing on the staircase leading to the hospital floor, a place where inmates were not allowed to be. He assisted PW2 to command the deceased to walk down the staircase and then took the deceased to wait outside the MO's office. While waiting the deceased was murmuring to himself and grinning foolishly. Therefore PW1 commanded him to sit outside the Treatment Room and then he resumed to attend his other duties.

26. At around 11 am PW1 heard So Ka-wai (D2) and Leung Shing-chi (D1) shout at someone in Putonghua along the lines of 'Sit down, the doctor is not ready yet', and then saw the deceased running into the Consultation Room. D1 and D2 attempted to stop him but ended up following him into the room. D3 Tang Yuk-po, also ran into the room. PW1 was the last one to enter the room at some 20 to 30 seconds later. As soon as PW1 entered the Consultation Room its door was closed. PW1 could not be sure who closed it.

27. In the Consultation Room PW1 saw the deceased standing next to the doctor's desk, his upper body bent on the same, with D2 and D3 holding down each of his shoulders. From the way PW1 described it, the deceased's head must have propped on his chin on the desk and his face was facing the computer table (see P9(22) and P2A). The deceased kept wriggling his body, shouting, 'I want to go home'. D3 repeatedly told the deceased to calm down and then instructed D1 and D2 to force the deceased down onto the floor, but even then the shouting and the struggling continued. Then D3 told the deceased not to move any more or OC foam will be used.

28. At that point PW1 suddenly remembered there were some 30 inmates waiting in the corridor and that there was only one other colleague on duty, so he left the room to attend to other duties. He stated that he did not witness the use of OC foam, nor did he see anyone using the extendable truncheons. He did not remember hearing any noise coming out of the Consultation Room.

29. At about 1059 hours D3 came out and instructed PW1, who was about 4 metres away from the Treatment Room, to escort all other inmates back to their own cells before going back into the room again.

30. Before the deceased entered the Consultation Room PW1 recalled that there was no injury on the deceased's face. He was not sure if there were bruises on the deceased's collar bone or limbs. He did not see any of the injuries on the deceased as shown in the post-mortem picture P8(4). He was inside the Consultation Room for about three minutes, the last minute of which the deceased was already on the floor. He did not notice the presence of any injury on the deceased before he left.

31. A few minutes later PW1 saw the three defendants taking the deceased up to the hospital ward, with D2 and D3 on each side and D3 walking behind. The deceased had his face lowered. There was pepper spray stain, a yellowish liquid, all over the deceased's face, but PW1 did not remember seeing redness on the deceased's neck. PW1 also stated it was a natural response for the part of the skin that came into contact with pepper spray to turn red.

32. Under cross-examination PW1 agreed since the event took place a long time ago his recollection was not very clear. He agreed he could not remember very clearly what happened that day. When asked again if he was sure that D3 give order to evacuate the inmates he first confirmed that this was the case

according to his recollection and then stated that he was not sure. Likewise, on the question of how much pepper spray he saw on the deceased's face, PW1 first stated that he saw it covering the whole face, and when further questioned he was not sure after all. He did clarify, under cross-examination, that when he saw the deceased emerging from the Consultation Room on the way to the hospital ward on the 1st floor he was being held on the arms by D1 and D2. PW1 did not notice if the deceased showed any sign of limping.

33. CSD Officer 4399 Mr. Chang Pak-ming (PW9), was on duty on the 1st floor on the morning of 15 August 2009. He was asked by D3 to fetch the doctor as an inmate had to go to the Protected Room. He was outside the Protected Room when D2 gave an injection to the deceased. Not long after Dr Wong Chi-ho (PW7) arrived and he went in to assist the doctor to carry out an examination of the deceased.

34. From the CCTV footage the whole process lasted no more than 77 seconds. PW7 only saw redness on the skin of the deceased's face and on the upper interior chest. He saw no other injuries on the deceased. Although the light was adequate he saw fit to carry out the visual examination with the help of the torch held by the CSD officer.

Evaluation of PW1's Evidence

35. At best PW1 can be described as a reluctant witness. His reluctance can be clearly illustrated by his manner of answering questions in court. On many occasions he deflected the questions put or simply avoided them by coming up with something else. I had to repeatedly remind him that he was under oath and directed questions to be put again. One could imagine, and hope, that a death during lawful custody was not a common occurrence, yet PW1 seemed to be suggesting in court that he did not have the curiosity to pay attention to the event and that it did not leave much impression on him.

36. Furthermore, it is difficult to understand how, in the heat of the moment when he saw the deceased being held down but still was struggling, he suddenly remembered he had other duties to attend to and leave the room immediately and henceforth did not bother to try to find out what happened next. However, according to his evidence he did leave the room at that point and, in my view, it must imply that he was satisfied the situation was under control and his assistance was not required. At that point the deceased was restrained by two CSD officers and D3 was about to use OC foam on him which would further reduce the strength of his resistance.

37. Although I have reservation on the part of PW1's evidence concerning his leaving the Consultation Room, I accept his account of events up to the point of his leaving the room and what he saw after he had left it. The deceased had no significant injuries on him before entering the room.

38. It is not clear how much time the defendants spent with the deceased. PW1 stated that he stayed inside the Consultation Room for three minutes before leaving to attend to the other duties and, 'approximately several minutes later, he saw the three defendants escorting the deceased to the hospital ward. According to the CCTV recording P7(7), the deceased was in the elevator at 11.09 on the way to the Protected Room on the 1st floor. The same picture showed that he was being escorted by D1 and D2 who held on to each of his hands. At 1118 hours he entered the Protected Room (I noted that the Admitted Facts MFI-1 wrongly put the time as 1120).

Evidence During the Deceased's Confinement in the Protected Room

39. After the deceased had been taken into the Protected Room at 1118 hours he was observed through the observation window by CSD officers on duty every 15 minutes. In addition four CSD officers were specifically deployed to monitor the

deceased through the CCTV monitor (see MFI-1, paragraph 20 and 22).

40. At 1120 hours a CSD officer took Polaroid photograhps of the deceased (See P7(11-12). He had no upper garment on. The Polaroid photographs were of such poor quality that it is impossible to tell if the deceased had injury on his person.

41. At 0340 hours on 16 August 2009, CSD officer Chiu Pak-ming (PW4) checked on the deceased and found him sitting on the floor of the Protected Room. He noticed a bruise the size of a fist on the deceased's outer thigh. He did not notice if there was any bruises on his face.

42. A large portion of the CCTV footage filmed during the deceased's confinement in the Protected Room had been played in open court (part of which was played fast forward to save time see P6A). The parties agreed that the undersigned can review the footage or any part thereof in chambers. The prosecution has also prepared a chart describing some of the deceased's significant movements during the 20 hours 47 minutes he spent inside the Protected Room. The accuracy of the description is not challenged: See MFI-4 and P19.

43. The CCTV footage is grainy and of very low resolution. It fails to show details on the deceased person. It does show (at 030009) a large patch of bruise on the outer side of the deceased right thigh.

44. I noted that when the deceased was interacting with the CSD officers and when he was examined by PW7 he did not appear to be agitated but instead was rather docile and even cooperative.

45. In the CCTV recording, the deceased's body was in full view at all times, except for the few minutes during which he

covered himself with a blanket, and there were a few seconds in which one could not make out where his hands were.

46. From the time the deceased entered the Protected Room to sometime after 072009 hours (See P19, when he was last seen moving by adjusting his right hand once), the deceased had been restless most of the time. Having reviewed the whole footage I cannot detect any instance in which the deceased tried to mutilate himself. Given that the walls of the Protected Room are all padded and it is designed to prevent the inmate detained therein from hurting himself, I found his movements during his confinement in the Protected Room did not cause any injuries on him.

The Resuscitation

47. At 0740 hours PW4 was informed that the deceased had collapsed and went immediately to the Protected Room. He saw two CSD officers performing cardiopulmonary resuscitation ('CPR') on the deceased. The cardio-defibrillator PW4 set up on the deceased did not detect any heart beat. He took over the CPR and then tried to put on an intravenous drip. He gave the deceased an injection of adrenaline and atropine before the deceased was taken to the Princess Margaret Hospital.

48. Mr Ip Chi-man, PW3, was the paramedic working for the Fire Services Department. When he arrived at Lai Chi Kok Reception Centre, the deceased had already been moved to the corridor and other CSD officers were carrying out CPR on him. He took over the resuscitation procedure and noticed that there were many bruises on the deceased's trunk and limbs. At the time the deceased was neither breathing nor had any pulse.

49. At 0816 the deceased was examined by Dr Wong Cheung-lu, resident of Prince Margaret Hospital(PW5). He too detected no vital signs. In accordance with the standard resuscitation protocol, the deceased was given adrenaline injection, his air

passage was kept open by first injecting a muscle relaxant before plying open his mouth by a laryngeal blade and inserting a tube into the deceased's throat. At the time PW5 noticed there were bruises on the deceased's eyes, back and sides. There were yellowish discharges close to the eyelids. PW5 maintained that none of the resuscitation procedure carried out would cause the injuries shown on P8 (6, 7 and 13). The deceased did not respond to the resuscitation and was certified dead at 0848 hours on 16 August 2009 (see P10).

50. The evidence of PWs 3 to 5 was not challenged. Having considered their evidence, I found the resuscitation procedure had been carried out by the book and could not have caused any significant external injury to the deceased.

Evidence of Medical Examination

51. Dr Wong Chi-ho (PW7) was a medical doctor attached to Lai Chi Kok Reception Centre since March 2008. Having examined the deceased at 0930 hours on 15 August 2009 he gave the deceased a clean bill of health (see MFI-1, paragraph 4, and the supplementary medical report P15, A6). PW7 found the deceased's physical condition to be 'stable' and found his general health condition 'satisfactory'.

52. At 1118 hours (see MFI-4 and P19), that is after the incident in the Consultation Room, he entered the Protected Room where he carried out a 'thorough examination' of the deceased. In court PW7 explained that by 'thorough', he meant 'sufficient'. He found red marks on the deceased's eyes, both cheeks, anterior chest wall, which were 'consistent with OC foam' (see P14, the memo dated 23 December 2009). He saw no foreign substance on the deceased's face, nor did he detect any serious injuries and swelling. The deceased was given intra-muscular injection for his 'unstable emotion and violent behaviour'.

53. At 0755 hours on 16 August 2009, when PW7 saw the deceased again, the paramedics had already arrived and had been carrying out resuscitation procedure. In an undated supplementary medical report (P15), in answer to question 17, PW7 stated that he did not notice the extensive bruising on the deceased's body, yet when asked directly in the next question about the large patch of bruises on the right thigh and eyes he said that he did notice them but he had 'no opinion over these bruises because of lack of clinical information at present'. In court he stated he also saw bruises on the deceased's face and limbs similar to those shown on P8(6-7).

54. PW7 did not make any notes of his findings on 16 August 2009 although, as he agreed under cross-examination, he had a duty to do so. He agreed to the defence's counsel's suggestion the reason for not doing so was 'perhaps he was too busy'. He did not remember when he wrote the undated P15. He gave ambiguous answers when questioned on the apparent contradictions between answers to Questions 17 and 18 in P15. In answer to my question he said that he did not remember how many inmates died on his watch.

55. From the CCTV footage played in court, PW7 entered the Protected Room at 11:13:22 and left at 11:14:39, spending less than 77 seconds inside for his 'thorough' or, as the good doctor qualified in court, 'sufficient' examination. At all times during this examination he was about 3 feet away from the deceased, with a CSD officer standing in between, carrying out visual examination with the aid of a torch held not by him but by the said CSD officer. From the footage, despite its poor quality, I was given an impression that it was the CSD officer who decided for PW7 where to look at by pointing the torch at various body parts of the deceased.

Evaluation of PW7's Evidence

56. I was not impressed by PW7 as a witness. He was evasive and defensive in answering questions by the prosecution and the defence. Even accepting that he had a heavy workload, for a doctor attached to the hospital of the Correctional Services Department, his primary concern should be the well-being of the inmates. I find it incredible that PW7 could have no recollection of how many inmates died on his watch, albeit by August 2009 he was attached to Lai Chi Kok for only 17 months. He was either less than honest or simply being callous. The cursory manner in which he carried out the examination of the deceased in the Protected Room was disgraceful to say the least. The indifferent attitude could also be reflected from the CCTV footage: not a moment during the 77 seconds' examination when he was inside the Detention Room did he approach the deceased to carry out a closer inspection. The CSD officer was always standing in between, directing the doctor's attention with a torch. I found the part of his observation of the deceased after the latter was taken up to the Protected Room very doubtful.

The Forensic Evidence

57. The prosecution called Dr Ng Chung-ki, PW8, a senior forensic pathologist of Kwai Chung Public Mortuary, to elaborate on the Autopsy Report (P17) compiled by him. His expertise is not challenged.

58. P17 sets out all the bruises found on the deceased. PW8 marked them on P8A. There were 84 headings of external bruises. Excluding the tattoo marks (item 82), a total of 117 bruises were identified on various parts of the deceased, including 10 items of multiple/small bruises. Internal examination revealed a reddish bruise in his scalp, various injuries in his thoracic cavity and fracture on three of his left ribs.

59. Having viewed the CCTV footage of the Protected Room (P7), PW8 was of the view that the injuries found on the deceased could not have been inflicted during his detention therein. He also ruled out the possibility that the injuries were post-mortem. For the same reason, and also in view of the quantity and extent of the injuries found, he also ruled out the possibility that injuries were produced after the deceased was found collapsed in the Protected Room.

60. Paragraph 2 of the remarks in P17 stated that the soft tissue injuries in the right buttock and right thigh were recent, consistent with the body parts hitting against or being hit with a hard object. From their number and distribution they were suggestive of a violent assault or vigorous struggle, whereas the fracture ribs could have been caused by the external cardiac massage performed during resuscitation. The injuries on the limbs could have been defence injuries caused by the victim's attempt to ward off weapons with his limbs.

61. On 18 August 2012 PW8 gave a further written opinion on the cause of the bruises (P18), the relevant part of which reads:

> "i. All the bruises and haemorrhage in the muscles of the right buttock and right thigh found in the deceased by the autopsy are consistent with having been produced by blunt force. The infliction of the bruises required a moderate amount of force, whereas the haemorrhage in the muscles involved a significantly greater amount of force. The injuries did not show a specific shape to suggest a particular causation. Events such as falling on hard objects, punching with fist, kicking, hitting by hard object are all possible causes of these injuries. However, judging from their large number and wide distribution, the incident leading to these injuries would involve multiple impacts to different areas of the body. Therefore, they are unlikely to be accidental in origin and area suggestive of a violent assault or vigorous struggle as mentioned in the autopsy report. The bruises found in the deceased were mostly located in the body parts that were only covered by thin layers of soft tissues such as those on the face,

> upper front of the chest, hips, back of the hands and front of the legs. These bruises should have become visible externally shortly after infliction. As to the bruises on the right buttock and right thigh, they were associated with bruising in the underlying muscles. Therefore, it is possible that these bruises were formed by diffusion of blood from damage in the deep subcutaneous or muscle layers. As the diffusion of blood in the tissues take time the bruises might have a delayed appearance and appear some hours after infliction."

62. In a further report dated 10 August 2011 (P21), PW8 gave his opinion on the specific injuries found on the deceased. He found most of the injuries consistent with being caused by blunt forces. However, when asked in Question 12 if the injuries could be caused by a struggle he opined:

> "The sort of injuries sustained during an assault or a struggle depends on the degree and form of violence of the event. Therefore, to determine whether the injuries present are resulted from an assault or a struggle often relies on the circumstantial evidence of the event. In the present case the number and severity of the deceased's injuries are suggestive of a violent assault. Nonetheless, just basing on the autopsy findings alone, the possibility that the injuries were sustained during a vigorous struggle could not be entirely excluded."

63. PW8 agreed in court that if the deceased had suffered from severe alcohol withdrawal it could have contributed to his demise. Yet the mere presence of marked fatty change in the liver (as was found in the autopsy report P17) could be suggestive of alcohol abuse but was not a reliable sign to indicate the degree of abuse owing to individual variations.

64. PW8 further stated that the bruise found on the deceased's head were not visible externally and could be caused by blunt forces. If the deceased was suffering from bleeding disorder, PW8 would expect it to be a persistent condition. Therefore he would expect to find bruises showing signs of healing, but none of which was found.

65. Under cross-examination PW8 pointed out that bruises would have appeared minutes or hours after the impact and were obvious to the eye. While those injuries could have been produced post-mortem, this would have required a much greater degree of violence and PW8 had never heard of or seen a case with so many post-mortem injuries as in this case in the 20 years of his professional life. He ruled out a bleeding disorder as he detected no sign of the same in the deceased.

66. As to the possibility of self-mutilation during the time when the deceased was covering himself with the blanket (see P7, at 1253 to 1404 hours), PW8 explained that there were two common causes for self mutilation: (i) To manufacture evidence for implicating others; such injuries were usually a small cut and abrasions and as a process was very painful. The extent of injuries rendered this unlikely. (ii) Mental disturbances, in which case one should be able to see the deceased inflicting injuries on himself on other parts of the footage, which there was none.

<u>Defence Evidence</u>

67. After I ruled that there was a case to answer, the defendants elected not to give evidence on factual issue, which simply means that I would have to decide on the factual matters on the merit or otherwise of the prosecution case. The defence did call Dr Beh Swan Lit, a Clinical Associate Professor in Forensic Pathology at the Department of Pathology, Faculty of Medicine, University of Hong Kong to give an expert's interpretation of the facts. His expertise was not challenged. His opinion was reduced into writing and produced as D1. Apart from stating that the redness over the deceased's eyes could have been caused by the OC foam, coupled with the deceased's own rubbing, Dr Beh did not seek to account for every injury found on the deceased as it was a known fact that there was a struggle between the latter and the CSD officers.

68. If I understand it correctly, Dr Beh was saying that the injuries found on the deceased could be less serious than they look and they could have been caused by much minor impacts.

69. Dr Beh based his opinion on the assumption that the deceased was, at the time, suffering from a bleeding disorder. Since people with a bleeding disorder are likely to bleed more profusely and for a longer period following the injury, the appearance of resulting bruises would appear bigger (see paragraph 49, D1). Therefore the deceased

> 'will be more likely to bleed and the bleeding would also take longer to stop. In such an individual any trauma would lead to the loss of more blood through the damaged blood vessels and hence the appearance of a larger area of bruising (see paragraph 38, D1).

70. When invited to elaborate on the correlation between the degree of force to be applied and the time of bruises to appear and the size of the bruises, Dr Beh stated that there was no precise formula available as there are too many variants involved. Dr Beh did say that most of the injuries found on the deceased's body were caused within a day. The injuries on the thigh and the head could have been caused by blunt forces. He expected a lot of superficial injuries should be visible shortly after their infliction. Having reviewed the CCTV footage, Dr Beh stated that he did not see any significant physical contacts which could cause the injuries found on the deceased, nor did he see specific signs to indicate the injuries were self-inflicted. He agreed that some of the injuries could have caused during the struggle in the consultation room.

<u>Evaluation of the Expert Evidence</u>

71. Both expert witnesses struck me as fair, impartial and objective. I defer to their expertise on these matters. When read closely, both witnesses were not that different in their opinions. The injuries found on the deceased were recent and

there were no signs to suggest that they were self-inflicted. Except for the fractured ribs the injuries could not have been caused by the attempts of resuscitation. Both could not identify exactly the manner in which any of the injuries were inflicted, nor could one correlate the degree of force used to cause any of the injuries found. The absence of abrasion means that the injury could have been caused by a blunt force, although both experts could not give a timeframe in which the injuries must have been visible. Both agreed that it should be very soon after their infliction.

72. The experts differed on the degree of force that could have caused the bruises. On the assumption that the deceased suffered from a bleeding disorder, Dr Beh opined that an individual suffering from such a condition would lose more blood and the resulting bruises would appear bigger and more sinister as the result of smaller traumas.

73. However, but accept such findings would require several leaps of faith. One would have to assume the followings:

(i) The deceased was a drinker.
(ii) He drank excessively and chronically.
(iii) His drinking problem was so serious that he suffered from severe alcohol withdrawal syndrome.
(iv) His alcohol withdrawal syndrome was so serious that it compromised his blood coagulating system;
(v) his blood coagulating system was so compromised that it rendered him vulnerable to bleeding excessively caused any minor trauma, resulting in the bruises subsequently found on the deceased.

74. None of the above assumptions was supported by any evidence, admissible or otherwise. Dr Beh agreed that he could find no physical proof or any evidence to support the postulation that the deceased was a chronic alcoholic. He agreed

that the deceased's fatty liver could have a number of causes other than alcoholism. He also agreed, under cross-examination, that a chronic alcoholic did not necessarily develop a bleeding disorder.

75. Dr Beh's assumption on the deceased's drinking habit was based on a reference to one Dr Tsang Fan-kwong's report in one Professor Vanezis' report (see paragraph 20, D1). Neither of these reports was available in this hearing, nor were their authors called to give evidence. The undersigned has not been able to assess their credibility and the credibility of any of the above factual assumptions. This court is therefore unable to make a factual finding for the rest of the assumptions in order to give credit of Dr Beh's prognosis.

76. I should also add that Dr Ng, PW8, in his testimony ruled out the possibility of bleeding disorder: if the deceased had suffered from such a condition, it would be chronic and there should be healed injury on the body. There were none. I therefore found that the existence of a bleeding disorder cannot be sustained for want of evidence. Accordingly I prefer the opinion of Dr Ng, PW8, on the cause of injuries.

<u>Factual Findings</u>

77. The events occurred in 2009, August. For some reason the prosecution only decided to prosecute two years later. The quality of the witnesses' evidence would of course suffer. Yet most of the evidence was not in dispute. From the evidence available I find that the deceased, although emotionally disturbed at the time, was of sound health when he was examined by PW7. I find beyond any doubt that the events leading to the deceased's rushing into the Consultation Room could not have resulted in any significant injuries found on him.

78. When PW1 left the Consultation Room the deceased was held down by D1 and D2, with D3 overseeing. There could be no doubt that at that point the trio was acting in concert trying

to subdue the deceased. They were exercising the power bestowed on them by the law to keep the order in Lai Chi Kok Reception Centre. I am satisfied that up to this point they had not been acting in excess of their power.

79. There is no evidence to make a finding of exactly how long the trio stayed with the deceased inside the consultation room. PW1 estimated it to be several minutes. During this period, OC foam, which only D3 was equipped with, was used on the deceased.

80. There was no also evidence accounting for what had happened during the time the defendants were alone with the deceased in the Consultation Room. Yet after the deceased was detained in the Protected Room for about 21 hours, multiple injuries had been found on his person. From the evidence available there was nothing during his detention that could cause any significant injuries on the deceased.

81. Both experts agree that the injuries found on the deceased were recent ones. They should be visible soon after their infliction. Even Dr Beh, the expert witness for the defence, said that the injuries could have caused during the time the deceased was with the three defendants in the Consultation Room. On that point I do not accept the evidence of PW7, who said that he could not see the injuries found on the deceased were not visible.

82. From the evidence available I found the only time in which the multiple injuries were inflicted on the deceased was the time the defendants were with the deceased inside the Consultation Room. I was convinced beyond all reasonable doubt that the defendants were responsible for those injuries.

83. While it would be impossible to account for each of the 117 external injuries found on the deceased, I accept PW8's

postulation that at least the injuries to the scalp and thigh were caused by blunt forces. At the time when PW1 left the Consultation Room the deceased had already been overpowered by D1 and D2 who were pinning him down onto the desk and then pressed him down on the floor. At this point D3 had announced his intention to use the OC foam which is designed to inflict discomfort and reduce the will and power to resist. It would seem that no more force was necessary other than continuing to pin him down on the shoulders. Yet after this incident multiple injuries were found on the deceased.

84. They can only be the result of what was done by the CSD officers to the deceased. The extent and the number of injuries were such that I am left with no doubt at all that the defendant had used unnecessary and grossly excessive force in order to subdue him. If the three defendants' sole intention was to restrain the deceased in order to calm him down and bring him up for detention in the Protected Room, they could have continued restraining him until the OC foam took its effect.

85. Although it is not clear whether the OC foam was administered before or after the aforesaid injuries were inflicted, in both cases the infliction of blunt forces on the head and the thigh was unnecessary, excessive and unjustified. In so doing, the CSD officers were acting outside of their lawful power.

86. There is no evidence for me to find which of the defendants was responsible for which particular injury found on the deceased. Yet since the three defendants were acting in concert both before and after the attack, I found that all the defendants are jointly liable for the infliction of the aforesaid injuries.

87. For the above reasons, I found the defendants guilty as charged.

(E. Lin)
Deputy District Judge